Filed 2/25/05 P. v. Richard CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CHAZERAE RICHARD, Defendant and Appellant.	B169076 (Los Angeles County Super. Ct. No. TA069168)

APPEAL from a judgment of the Superior Court of Los Angeles County, Arthur M. Lew, Judge. Affirmed.

Rita L. Swenor, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc J. Nolan, Supervising Deputy Attorney General, and Erin M. Pitman, Deputy Attorney General, for Plaintiff and Respondent., Deputy Attorney General, for Plaintiff and Respondent.

Chazerae Richard appeals from the judgment entered following a jury trial in which he was convicted of burglary. He contends that the trial court committed prejudicial error by instructing on his tardiness in disclosing a witness's statement and alternatively that trial counsel rendered ineffective assistance in investigating the case. Defendant further contends his *Wheeler*[1] motion should have been granted. We affirm.

BACKGROUND

On March 18, 2003, Halima Ross left her house in Compton to go to work. At 1:52 p.m. her home burglar alarm was activated. Ross returned home upon receiving word of the alarm, arriving about 2:15 p.m. A bedroom window had been broken. The house had been ransacked and jewelry boxes and stereo and video equipment were missing.

A large avocado tree stands in Ross's backyard. Ross noticed avocado matter on the floor near her back door inside the house. She also noticed a shoe print of avocado matter on a manila folder on the bedroom floor. Defendant lived next door to Ross. About 10 minutes after she returned home, Ross saw defendant emerge from his home with another person. Ross asked defendant if he had heard the burglar alarm or knew anything about the break-in. Defendant said that he did not.

Sheriff's deputies soon arrived and conducted an investigation. One deputy saw "avocado-like footprints" from a single pair of shoes that extended from Ross's back door to a wall that separated Ross's and defendant's yards; on the other side of the wall the footprints continued on through defendant's backyard and to the rear door of defendant's house. The deputy went to the house and defendant answered the door. Defendant said that his brother and his brother's friend were also there. When defendant opened the door, the deputy saw defendant's brother wiping what appeared to be avocado matter from the kitchen floor. Deputies obtained a search warrant for the house.

---

[1] *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

The search revealed that the house had three bedrooms. One was a master bedroom that belonged to defendant's parents. The other two had single beds. In the closet of one of those two rooms was a certificate with defendant's name on it. Ross's stereo and video equipment was also in that room. (Other property taken from Ross's house was never recovered.) The second smaller bedroom contained clothing of a larger size than the clothes in the bedroom with defendant's certificate; defendant's brother is larger than defendant.

The shoes of the three males in the house were also inspected. The soles of the shoes of defendant's brother and his friend the were clean. But the soles of defendant's shoes had what appeared to be avocado matter adhering to them. In addition, the tread pattern of defendant's soles matched the shoe prints observed by the deputy. (The shoe print on the manila folder that was found in the bedroom came from a different shoe.)

In defense, Twana Cook, who is defendant's older sister, testified that on the day of the burglary defendant picked her up at her residence a little after noon to take her grocery shopping and was with her until he dropped her off at her home and left a little after 2:00 p.m. Cook first knew her testimony might be needed when she received a subpoena a couple of days before she testified. (An investigator also testified for the defense, stating that it took him 13 minutes to drive from Cook's house to defendant's house in 2:00 p.m. traffic conditions.

In rebuttal, Ross's father testified that he went to Ross's house as soon as the alarm company called, arriving about 10 minutes later. He entered the house with a key he had, reset the alarm, and went out to the front to wait for the police to arrive. While waiting, he did not see anyone drive up to defendant's house next door.

The prosecutor presented the case on the theory of aiding and abetting. He argued that someone other that defendant climbed through Ross's window because defendant was too big to fit. That person handed the stolen items out the back door to defendant, and defendant walked through the yard and put some of the items in the bedroom of his residence. Defendant relied on his alibi witness. He also argued that the shoe prints were unclear and inconclusive, the evidence linking him to the bedroom where Ross's

electronic equipment was found was open to doubt, and that the prosecution witness's testimony regarding the timing of events was not reliable.

DISCUSSION

1. Alibi Witness

The defense did not disclose alibi witness Cook to the prosecutor until the start of trial and stated that Cook had not yet been interviewed so there was no statement that could be turned over. (The defense had requested a short continuance to conduct the interview and provide the prosecutor with the statement; the request was denied.) The prosecutor raised the issue of discovery sanctions, and the court ordered that the defense give Cook's statement to the prosecutor by that afternoon. In a later discussion regarding jury instructions, the prosecutor requested CALJIC No. 2.28 (Failure to Timely Produce Evidence). Defense counsel opposed the request, stating he had no idea that Cook would be called as a witness until trial had started. In a proceeding from which the prosecutor was excluded, counsel explained that it was not until his preparation immediately before trial that he realized the possibility of an alibi defense and decided to interview Cook. When the prosecutor returned, the court made a finding that the failure to disclose Cook as a witness was not intentional, but because the alibi was important and there was a delay in disclosure, CALJIC No. 2.28 would be given.[2]

---

[2] The jury was instructed pursuant to CALJIC No. 2.28 as follows:

"The prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial so as to promote the ascertainment of the truth, save court time and avoid any surprise which may arise during the course of the trial. Delay in the disclosure of evidence may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the non-complying party's evidence.

"Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately. In this case, the Defendant failed to timely disclose the following evidence:

"Witness Tawana Cook

(footnote continued on next page)

Defendant contends that he is entitled to reversal of his conviction because the instruction was improper and alternatively because trial counsel was ineffective in conducting his trial preparation, thereby creating a basis for the instruction. We disagree.

At the outset, we note the inconsistency between the trial court ruling that failure to disclose Cook as a witness was not intentional but then instructing the jury in CALJIC No. 2.28 regarding "the evidence each [party] *intends* to present at trial." We further note that recent cases have criticized use of CALJIC No. 2.28 where the defendant has failed to disclose evidence timely, reasoning that the instruction provides little guidance on the consequences of the failure to disclose and might lead the jury to conclude that the defendant can be found guilty based solely on failure to comply with the discovery statute. (See *People v. Bell* (2004) 118 Cal.App.4th 249, 255–256; *People v. Cabral* (2004) 121 Cal.App.4th 748, 751–752; *People v. Saucedo* (2004) 121 Cal.App.4th 937, 942–943.) But assuming CALJIC No. 2.28 should not have been given, we conclude that defendant was not prejudiced either by the instruction (see *People v. Bell*, *supra*, 118 Cal.App.4th at p. 257, and *People v. Cabral*, *supra*, 121 Cal.App.4th at p. 753 [analyzing prejudice under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, to CALJIC No. 2.28][3]) or by the conduct of trial counsel that might have caused the instruction to be given (see *In re Cox* (2003) 30 Cal.4th 974, 1019–1020 [claim of ineffective assistance

---

(footnote continued from previous page)

"Although the Defendant's failure to timely disclose evidence was without lawful justification, the Court has, under the law, permitted the production of this evidence during the trial.

"The weight and significance of any delayed disclosure are matters for your consideration. However, you should consider whether the untimely disclosed evidence pertains to a fact of importance, something trivial or subject matters already established by other credible evidence."

[3] Prejudice was found under *Watson* in *Bell* and *Cabral*, both *supra*. In *People v. Saucedo*, *supra*, 121 Cal.App.4th at pages 943–944, the court did not specify what standard of prejudice it was using and found the instruction harmless.

may be disposed on ground of lack of prejudice]; *In re Clark* (1993) 5 Cal.4th 750, 766 [prejudice from ineffective assistance of counsel is established if counsel's failing undermines confidence in the outcome of trial]).

We have examined the trial transcript and the exhibits that were submitted into evidence. The circumstantial evidence against defendant was overwhelming: Property stolen from the victim was found in a bedroom of a three-bedroom house. That bedroom was demonstrated to belong to defendant based on the presence of a certificate with defendant's name and because one of the two remaining bedrooms clearly belonged to defendant's parents and the other had clothes in the closet appearing to fit defendant's brother but not defendant. In addition, the soles of defendant's shoes had avocado matter on them and their tread pattern matched that of shoe prints that led from the victim's back door to defendant's house next door. Given this evidence, it is not reasonable that the jury would have believed defendant's alibi, which was provided by a close relative and which required an exact recollection of the time when defendant left her house following a trip to the market. Accordingly, defendant's contention of prejudicial error must be rejected.

2. *Wheeler* Issue

Defendant, who is African-American, contends that the trial court erred in denying the *Wheeler* motion he made following the prosecutor's exercise of peremptory challenges of four of the five African-American prospective jurors who were on the panel. We disagree.

Prospective Juror No. 3121 was single, lived in Lynwood, and had an adult son who lived out of state. She was employed as a mail carrier. She had no prior jury experience and had been the victim of a burglary.

Prospective Juror No. 5948 lived in Inglewood, was married, and had three children. He was employed at a bail bonds office, had no prior jury experience, and had been a burglary victim.

Prospective Juror No. 9011 was divorced, lived in Los Angeles, and had two grown sons. She "work[ed] for L.A. Unified School District as a special ed. trainee."

She had served on a criminal jury and had been the victim of a purse snatching. It would be an economic hardship for her to serve on the jury.

Following the excusal of these three prospective jurors, defendant made a *Wheeler* motion. The court concluded that a prima facie case had not been shown and voir dire continued.

Prospective Juror No. 9381 lived in Hawthorne and was single. She was employed as a teacher. She had served on a criminal jury and had been the victim of a crime.

When this prospective juror was excused, defendant renewed his *Wheeler* motion. The trial court stated it appeared that the prosecutor had good reason to excuse the first three African-American prospective jurors, "[a]nd if I were to find a prima facie case as to any one of them, it would just be the last one. But if I am going to find that then I think [the prosecutor] has to justify all of them."

The prosecutor responded: "Your Honor, as to juror — the last juror [Prospective Juror No. 9381], it's been my experience and practice to excuse teachers which I also did with regard to juror number 16 who became juror number 5. He was a science teacher, an Asian male, not a Black person, who I also excused who is a science teacher. That's the same with juror number 18 who became juror number two [Prospective Juror No. 9011]. She was a special ed. trainee for the school district, also a school teacher. It is my experience and practice they don't make good jurors. Juror number one [Prospective Juror No. 3121], a postal worker, it is my experience and practice postal workers don't make good jurors and I always excuse postal workers as jurors. [¶] . . . [¶] Finally, juror number 5948 who is a Black male is a bail bondsman and I am not going to keep someone who deals that closely with defendants."

The use of peremptory challenges to remove potential jurors on the basis of a group bias, such as race, is not permitted (*People v. Wheeler*, *supra*, 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712]), and race-neutral explanations for the exercise of preemptory challenges against members of a cognizable group must be examined to determine whether they are pretextual (*People v. Alvarez* (1996) 14 Cal.4th

155, 196). But there is nothing to indicate that the prosecutor's stated reasons for removing the subject jurors in this case was based on pretext.

We first note that the prosecutor did accept one African-American as a juror. (See *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1044 ["the fact that the prosecutor accepted Blacks on the jury is a valid, though not necessarily dispositive, consideration in determining whether the prosecutor violated *Wheeler* in excusing other Blacks from the jury panel"].) And of the four African-American prospective jurors who were excused, the prosecutor explained his challenges were based on the prospective jurors' occupations.

Prospective Juror No. 5948, a bail bondsman, necessarily worked closely with the criminal justice system, which has been recognized as a basis for creating bias in deliberations. (See *People v. Reynoso* (2003) 31 Cal.4th 903, 923.) Prospective Juror No. 9381 was a teacher and Prospective Juror No. 9011 a school district special education trainee. As explained by the prosecutor, it is his practice to excuse teachers, and he had also excused a non-African-American prospective juror from the panel. (See *People v. Barber* (1988) 200 Cal.App.3d 378, 394 ("Peremptory challenges are often exercised against teachers by prosecutors on the belief they are deemed to be rather liberal"].)[4] Finally, with respect to Prospective Juror No. 3121, courts which have directly addressed the issue of exercising peremptory challenges against postal workers have viewed this as a race-neutral reason. (See, e.g., *Williams v. Groose* (8th Cir. 1996) 77 F.3d 259, 261 ["prosecutor explained he removed jurors Lacy and Tillman because they are postal workers. This reason is race neutral"]; *Johnson v. State* (Ga. 1996) 470 S.E.2d 637, 639 [that prospective juror "was a postal worker, and postal workers, in the prosecutor's experience, do not make good jurors" was legitimate neutral reason]; *State v. Hinkle*

---

[4] We observe that in support of its argument on this point respondent cites *People v. Hayes* (1996) 44 Cal.App.4th 1238, 1245. On July 31, 1996, the Supreme Court ordered the *Hayes* opinion to be depublished.

(Mo.App.E.D. 1999) 987 S.W.2d 11, 13 ["because postal workers are historically bad jurors for the state" was legitimate neutral reason].)

Based on the foregoing, the prosecutor's stated race-neutral reasons for exercising peremptory challenges against four African-American prospective jurors must be upheld.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, J.

We concur:

SPENCER, P. J.

SUZUKAWA, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.